82-994

No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT WELCH, INC.,

Petitioner,

v.

ELMER GERTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID MACHANIC
J. LAURENT SCHARFF
*GEORGE R. CLARK
ROBERT TRAGER
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

GARY HANDY
395 Concord Avenue
Belmont, Mass. 02178
(617) 489-0606

Counsel for Petitioner
**Counsel of Record*

December 14, 1982

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTIONS PRESENTED

Following remand from this Court, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and retrial in 1981, the United States Court of Appeals for the Seventh Circuit affirmed a judgment entered on a jury verdict by the United States District Court for the Northern District of Illinois for $100,000 in compensatory and $300,000 in punitive damages in this libel action brought by respondent Elmer Gertz against petitioner Robert Welch, Inc. This is the second largest unreversed jury verdict against a media defendant in a libel case decided after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which appeals of right have been exhausted. The Court of Appeals concluded that the editor of petitioner's journal of conservative political opinion acted with reckless disregard of the truth because objectively he must have had "obvious reasons" to doubt the accuracy of the disputed article, which was authored by a freelance writer, and therefore should have investigated the article further. The "obvious reasons" which the Court of Appeals found to require further investigation were what it called the "unreasonable" political views of the freelance writer. The Court of Appeals imposed this duty of investigation even though subjectively the editor had confidence in the freelance writer and agreed with his views.

The following questions are presented:

1. Whether the decision below conflicts with decisions of this Court (including the prior decision in this case) by use of an objective rather than a subjective standard for a finding of actual malice thereby impermissibly burdening the expression of controversial political opinion in violation of the First Amendment.

2. Whether the decision below presents an important question of federal constitutional law which needs to be decided because it finds actual malice to be proven by attributing to the publisher a freelance writer's conduct without regard to the publisher's subjective awareness of falsity *vel non*.

3. Whether the decision below conflicts with decisions of this Court (including the prior decision in this case) and other

federal courts of appeals and state courts that expressions of political opinion, such as calling a person a "Marxist," "Leninist" or "Communist-fronter," are protected by the First Amendment and are not statements of fact subject to testing for falsity in a libel action.

4. Whether the decision below presents an important question of federal constitutional law because large awards of damages in libel actions, when as here they are unsupported by proof of injury to the plaintiff's reputation, unjustifiably inhibit First Amendment freedoms, so that recovery of damages for libel should be precluded absent proof of injury to reputation.

5. Whether the decision below conflicts with this Court's prior decision because the Court of Appeals allowed relitigation of the actual malice issue when it was the "law of the case" that petitioner did not act with actual malice.*

*Pursuant to Rule 28.1 the Petitioner states that Robert Welch, Inc., has no parent company nor any subsidiary or affiliate corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Page

Constitutional and Statutory Provisions

Page

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-

ROBERT WELCH, INC.,

Petitioner,

v.

ELMER GERTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert Welch, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the remanded action is reported at 680 F.2d 527 (7th Cir. 1982) (App. 3a). The opinion of this Court reversing and remanding the first Court of Appeals opinion is reported at 418 U.S. 323 (1974). Earlier opinions are reported at 471 F.2d 801 (7th Cir. 1972) (App. 37a); 322 F. Supp. 997 (N.D. Ill. 1970); 306 F. Supp. 310 (N.D. Ill. 1969).

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1982. A timely petition for rehearing and suggestion for a

rehearing *in banc* was denied on September 15, 1982 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

STATEMENT OF THE CASE

This is an action for libel which was tried to a jury in April, 1981, on remand from a decision of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) [hereinafter *Gertz I*]. The alleged libel was contained in a polemic 18-page article by a freelance writer, Alan Stang, entitled "Frame-Up – Richard Nuccio And The War On Police," which was published in the April, 1969, edition of *American Opinion*, a conservative journal of political opinion published by petitioner Robert Welch, Inc., a corporate affiliate of The John Birch Society.[1]

---

[1]The Seventh Circuit in the first appeal stated:

> The article is 18 pages long. It is concerned with the trial and conviction of officer Nuccio for the crime of murdering a 17-year old boy named Nelson. The article is intended to persuade the reader that Nuccio was the victim of a "frame-up," and that the frame-up was part of a national conspiracy to discredit local police forces; the purpose of that conspiracy is to lay the groundwork for the creation of a national police force, which, in turn, is a step toward a totalitarian state.
>
> The article purports to analyze the evidence against Nuccio so incisively that the falsity of several witnesses' testimony at Nuccio's trial, and the error of the trial judge's finding of guilt, will be manifest to the reader.

Gertz v. Robert Welch, Inc., 471 F.2d 801, 803-04 (7th Cir. 1972) (footnote omitted) (Stevens, J.) (App. 40a-41a).

This case, which was brought under diversity of citizenship jurisdiction, was originally tried to a jury in September, 1970. That jury returned a verdict in favor of the respondent for $50,000.

In the initial trial "[a]ll issues were withdrawn from the jury except the proper measure of damages." *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970). The District Court granted the petitioner's motion for judgment notwithstanding the verdict, holding that the article concerned a matter of public interest and Mr. Gertz had failed to prove that the petitioner acted with the requisite degree of "actual malice" required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Gertz v. Robert Welch, Inc., supra*, 322 F. Supp. at 999.

On appeal to the Seventh Circuit, in an opinion by then Circuit Judge Stevens, the District Court was affirmed, holding that there was no evidence that the petitioner had acted with actual malice as is required under *New York Times, supra. Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 807 (7th Cir. 1972) (App. 47a).[2]

On review, this Court agreed with the lower courts that Mr. Gertz had failed to prove that the petitioner acted with actual malice. *Gertz I, supra*, 418 U.S. at 331-32. It reversed and remanded the case for a new trial, however, because it held that even though the article concerned a matter of public interest Mr. Gertz was not a public figure. Therefore, he did not have to prove actual malice to recover compensatory damages so long as liability was not imposed on the petitioner without fault and Mr. Gertz proved his compensatory damages rather than allowing them to be presumed as had happened at the first trial. *Gertz I, supra*, 418 U.S. at 352. Because Mr. Gertz had not been permitted to make a claim for compensatory damages by a stan-

[2]For the convenience of the Court, the 1982 and 1972 decisions of the Court of Appeals and the opinions of the second District Court are set forth in the Appendix at App. 3a, 37a, 29a and 31a respectively.

dard less than that imposed by *New York Times, supra,* he was granted a new trial to pursue that remedy.

On remand the District Court in ruling on cross motions for summary judgment found that it was the law of the case that Mr. Gertz was not a public figure and that the article contained false statements. It refused the petitioner's request to find as the law of the case that the petitioner had not published with actual malice. Memorandum Opinions, June 7, 1977, and Feb. 15, 1978 (App. 29a, 31a).

At the conclusion of the evidence, the District Court held that because public records had been relied upon in the preparation of the article the petitioner was entitled to a conditional common law privilege under Illinois law, which then required Mr. Gertz to prove actual malice to recover compensatory as well as punitive damages. The jury was instructed accordingly. 680 F.2d at 534 (App. 14a).

On April 22, 1981, the jury returned a verdict awarding the respondent $100,000 in compensatory damages and $300,000 in punitive damages. The District Court denied petitioner's motions for judgment notwithstanding the verdict, a new trial and a remittitur.

On appeal, the Seventh Circuit affirmed, holding that the actual malice issue was not "determined and foreclosed from reconsideration" by this Court in *Gertz I;* that a finding of actual malice was supported by the evidence; and that a sufficient actual injury was proved to support compensatory damages. A timely petition for rehearing and suggestion for rehearing *in banc* was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with this Court's interpretation of the actual malice standard in defamation cases as explicated in *Gertz I, supra,* 418 U.S. at 335 n. 6, *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), and *Garrison*

v. Louisiana, 379 U.S. 64, 77 (1964), and presents other important federal questions which should be decided by this Court.

When this Court first heard this case over eight years ago, it issued a landmark opinion, *Gertz I, supra,* 418 U.S. 323, one that has had a profound impact on the law of libel. Petitioner submits that the court below misunderstood and misapplied several important holdings in that opinion and thus its decision is in direct conflict with this Court's decision rendered in 1974. If unreviewed, the Court of Appeals' decision portends major changes in libel law as established by this Court.

The importance of this case is as follows. First, the Court of Appeals decision allows juries to use an objective standard in establishing whether a defamation defendant acted in reckless disregard of the truth, rather than the subjective standard required by this Court since *New York Times, supra.* This leads, as in this case, to a jury and the reviewing court utilizing their own political viewpoints to determine whether a defendant should have been made aware of probable falsity.

Second, the Court of Appeals decision demands that editors independently investigate material submitted by freelance writers even when the editors do not doubt the writer's veracity. This places an intolerable burden on editors, particularly of magazines and books, who publish material written by freelancers.

Third, the decision below holds that non-specific political characterizations can be considered false statements of fact, and therefore actionable, rather than constitutionally protected expressions of opinion.

Fourth, the Court of Appeals allowed recovery of compensatory and concomitant punitive damages in the absence of proof of injury to reputation. This ignores the essential element of a libel action, damage to reputation. This is an important federal Constitutional question that needs to be considered by this Court.

Fifth, contrary to the law of the case in *Gertz I*, the District Court and the Court of Appeals erred on remand in allowing the issue of actual malice to be litigated when this Court had determined that there was no actual malice and had granted a new trial solely for the purpose of litigating issues of negligence and compensatory damages, which became unnecessary when the trial court held that Illinois law required an actual malice finding in the circumstances of this case.

I. IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS, THE COURT BELOW UTILIZED AN OBJECTIVE RATHER THAN A SUBJECTIVE STANDARD IN DETERMINING THE EXISTENCE OF ACTUAL MALICE.

The trial court ruled, and the jury was instructed, that in order for respondent to recover he had to prove that the defamatory statements were made with actual malice, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 534 (7th Cir. 1982) (App. 13a), defined by this Court as being "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not."[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

"Reckless disregard" as to falsity requires evidence showing a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana, supra*, 379 U.S. at 74, or evidence permitting "the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson, supra*, 390 U.S. at 731. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967).

---

[3]Whether the trial court should have required the jury to find actual malice because of conditional privilege under Illinois law before awarding either compensatory or punitive damages was finally resolved by the Seventh Circuit thusly: "The jury below, however, was required to find that negligence *and* actual malice were proved to find liability." Gertz v. Robert Welch, Inc., 680 F.2d 527, 537 (7th Cir. 1982) (emphasis added by Court of Appeals) (App. 21a). Under *Gertz I, supra*, actual malice must be found before punitive damages can be awarded.

In *Gertz I* and *St. Amant,* this Court held that actual malice is a subjective standard, not one measured by an objective, "reasonable person" test. That is, reckless disregard for the truth is "equated . . . with subjective awareness of probable falsity . . .," *Gertz I, supra,* 418 U.S. at 335 n. 6, *and not* "whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson, supra,* 390 U.S. at 731. "There must be sufficient evidence to permit the conclusion that the *defendant in fact* entertained serious doubts as to the truth of his publication." *Id.* at 731 (emphasis added). This Court has emphasized that a defamation plaintiff must "focus on the conduct and state of mind of the defendant." *Herbert v. Lando,* 441 U.S. 153, 160 (1979).

However, the Court of Appeals incorrectly used an objective, "reasonable man" test in this case, mistakenly applying language in *St. Amant:* "'Professions of good faith will be unlikely to prove persuasive, . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found *where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' St. Amant v. Thompson,* 390 U.S. 727, 732 (footnote omitted) . . . ." 680 F.2d at 538 (emphasis added by Court of Appeals) (App. 22a).

The Court of Appeals found that the editor Mr. Stanley had "obvious reasons" to doubt the author Mr. Stang's "veracity" or "accuracy" because: (1) Mr. Stanley knew Mr. Stang, solicited the article from him and was familiar with his prior work; (2) in that prior work Mr. Stang allegedly "[i]nvariably . . . had labeled someone a Communist" and thus had a "known and *unreasonable* propensity to label persons or organizations as Communist" (App. 23a, 24a) (emphasis added); and (3) in light of these supposedly objective warnings of Mr. Stang's alleged unreliability, Mr. Stanley conducted only a brief independent investigation of the facts. The Court of Appeals then concluded that these facts were "more than enough evidence" to

show that the "article was published with utter disregard for the truth or falsity of the statements" about Mr. Gertz. 680 F.2d at 538, 539 (App. 24a).

The facts relied upon by the Court of Appeals are constitutionally insufficient to support a finding of actual malice. The Court of Appeals finding of actual malice derives from its application of an objective, "reasonable man" test rather than the constitutionally required test of subjective awareness of probable falsity on the part of the editor.

The Court of Appeals in the instant case focused on the writer's previously expressed political opinions, noting that he had written articles and books for the publisher, some of which Mr. Stanley had edited, and contending that Mr. Stang had "a known and unreasonable propensity" to label as Marxist or under Communist control such "diverse persons and organizations . . . [as] Richard Nixon, John Foster Dulles, U Thant, Hubert Humphrey, Pierre Trudeau, Dr. Martin Luther King, and the Democratic Party." 680 F.2d at 538, 539 (App. 23a). According to the court, these opinions constituted "'obvious reasons to doubt the veracity . . . or accuracy' of the author . . ." *Id.* at 538.[4]

However much one with mainstream political opinions may find that Mr. Stanley should have had "obvious reasons" to question the writer, those reasons were not obvious to an editor who shared such views. Mr. Stanley was editor of a magazine published by a politically conservative organization. His own

---

[4]Although this petition is not the place for a detailed discussion of the evidence, two things about the Court of Appeals' use of this "evidence" as supplying reason for Mr. Stanley to doubt Mr. Stang's veracity should be noted: (1) the "evidence" concerning Richard Nixon was stricken by the trial court (Tr. 217); and (2) after a lengthy argument the trial court refused to allow Mr. Stang to explain the factual basis for his political views, holding that to be irrelevant to the article (Tr. 465-69) —yet those same views form the lynchpin of the Seventh Circuit's finding on actual malice.

political beliefs were close to the writer's; there is no evidence in the record that he thought the article's accusations were obviously incorrect. The article's thesis, that there existed a Communist conspiracy to discredit the nation's police, was not without support among conservative groups in the late 1960s and would not appear highly unusual to many on the political right. In fact, the article was perfectly plausible to Mr. Stanley. This reasoning is entirely consistent with the earlier decision in this case rendered by the Court of Appeals which, speaking through then-Circuit Judge Stevens, said that "[e]ven if the [John Birch Society's] references to President Eisenhower [as a Communist] had been offered [in evidence], such evidence would not meet the *New York Times* standard . . . . At most, . . . [such an accusation] *tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff.*" *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 807-08 n. 15 (7th Cir. 1972) (emphasis added) (App. 49a). To an editor who agreed with the writer's political views the article in question was not obviously inaccurate so as to place him on notice that the author was unreliable.

In holding that an author's "unreasonable" political beliefs and opinions can be an obvious reason to doubt his veracity or accuracy, the Court of Appeals decision conflicts with every other court which has faced the question, all of which have reached a conclusion contrary to that of the lower court here. *See, e.g., Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1028-29 n. 7 (5th Cir. 1975) (political and social bias of a source is not an indication of potential falsehood); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 806 (8th Cir. 1968) (defendant's clear political bias in its editorial policy so as to emphasize unfavorable comment on persons holding contrary views cannot be evidence of actual malice); *Washington Post Co. v. Keogh*, 365 F.2d 965, 971-72 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (columnist's controversial reputation even for veracity is irrelevant to finding of actual malice); *Nader v. de Toledano*, 408 A.2d 31, 56 (D.C. 1979), *cert. denied*, 444 U.S.

1078 (1980) (controversial and iconoclastic nature of author's viewpoints does not as a matter of law put publisher on notice of probable falsity); *Kidder v. Anderson,* 354 So. 2d 1306, 1309 (La.), *cert. denied,* 439 U.S. 829 (1978) (mere fact that source might be politically motivated cannot form the basis for holding that publisher acted with reckless disregard for the truth).[5]

The Court of Appeals emphasized that "Stanley solicited the article," and that "Stanley had contacted Stang and told him that a Chicago policeman was being railroaded for murder, part of the nationwide Communist conspiracy to discredit police." *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 538 (7th Cir. 1982) (App. 23a). This only confirms further that Mr. Stanley would agree with the views expressed by Mr. Stang in the article. Mr. Stang's views, then, would not be obvious reasons for *Mr. Stanley* to doubt the article's truthfulness.[6] Additionally, because Mr. Stanley had extensive prior experience with Mr. Stang's heavily documented writings, Mr. Stanley believed that Mr. Stang's work was "scrupulously accurate as to detail and fact in every instance" which he had encountered. (Tr. 397-98.)

---

[5]None of the four cases relied upon by the Court of Appeals (App. 22a) utilized the opinions and belief of the source as showing that a publisher should be aware that that source may be inaccurate. All of the cases dealt with facts. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-70 (1967) (Warren, C.J., concurring) (author placed on notice by at least two persons that specific parts of story were false); *Carson v. Allied News Co.,* 529 F.2d 206, 212 (7th Cir. 1976) (author admitted fabricating parts of story); *Grzelak v. Calumet Publishing Co.,* 543 F.2d 579, 583 (7th Cir. 1975) (when publisher does not doubt either the integrity of the source or the accuracy of the facts, actual malice cannot be found); and *Fadell v. Minneapolis Star & Tribune Co.,* 425 F. Supp. 1075, 1084 n. 7 (N.D. Ind. 1976), *aff'd,* 537 F.2d 107 (7th Cir.), *cert. denied,* 434 U.S. 966 (1977) (charges are not inherently improbable merely because they are serious).

[6]In fact, the record shows that Mr. Stanley learned of the Chicago situation from a member of the John Birch Society. Mr. Stanley then contracted with Mr. Stang to investigate, but did not ask him to "slant" the resulting article in any way. (Tr. 187-88.)

Likewise, Mr. Stanley's office never had received a complaint about Mr. Stang's work nor needed to publish a retraction based on anything written by him. (Tr. 401.) Accordingly, Mr. Stanley, for all these reasons, *subjectively* had no reason whatsoever to doubt the accuracy of Mr. Stang's article, and certainly could not have acted with "reckless disregard" of any falsity, as required by *New York Times* and its progeny.

The Court of Appeals holding forces all publishers and editors to reframe their thinking into a generally acceptable political mold so that when a writer's opinions differ significantly from the mainstream they will appear obviously inaccurate – no matter what the publisher's or editor's actual political beliefs are. That is, a publisher or editor holding, for example, a strongly liberal or conservative viewpoint will not be able to use his subjective frame of reference in assessing submissions for fear that material appearing reasonable to him will, in fact, be seen as obviously inaccurate by courts and juries whose political opinions are not as strongly liberal or conservative.

Mr. Gertz did not establish with "convincing clarity," *New York Times Co. v. Sullivan, supra,* 376 U.S. at 285-86, that the editor actually knew anything at the time of publication that would cause him to believe the story was false. *See St. Amant v. Thompson, supra,* 390 U.S. at 732-33. In finding there was sufficient evidence of actual malice to submit this case to a jury, the Court of Appeals made its objective measurement based only on its political stance, not on Mr. Stanley's subjective viewpoint. An objective standard – no matter whose – is not permitted by this Court's prior holdings.

If the Court of Appeals decision stands, juries and trial courts will be able to find actual malice in the publication of material that does not agree with their political proclivities rather than in material published when the publisher or editor *in fact* knew of falsity or acted in "reckless disregard" of whether a statement was false or not. The decision places an unconstitutional burden on the expression of controversial political opinion.

II. THE DECISION BELOW RAISES A SIGNIFICANT CONSTITUTIONAL PROBLEM IN ATTRIBUTING TO THE PUBLISHER AS PROOF OF ACTUAL MALICE A FREELANCE AUTHOR'S CONDUCT WHILE WRITING AN ALLEGEDLY DEFAMATORY ARTICLE

While the determination of whether an agency relationship exists ordinarily is a matter of state law, here the Court of Appeals used that supposed relationship to determine the petitioner's subjective awareness of falsity of the allegedly defamatory article; it thus becomes an important federal question whether attribution to a publisher of a freelance writer's actions is permitted under the First Amendment.

The Court of Appeals, in a lengthy footnote, found Mr. Stang's "conduct in investigating and researching the article . . . attributable to Welch because of the agency relationship between them." 680 F.2d at 539 n. 19 (App. 25a). Since the court held that Mr. Stang's conduct "is evidence of actual malice," *id.*, under an agency theory the petitioner was found to have acted with actual malice.

Significantly, the first Court of Appeals decision found that no agency relationship existed between Mr. Stang and the petitioner: "Plaintiff seems to contend . . . that defendant should be held liable on a *respondeat superior* doctrine for the malice of Stang. We do not find the . . . 'contributing editor' characterization [as listed in later issues of the magazine] . . . sufficient to change the free-lance character of Stang's relationship with defendant." *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 808 n.15 (7th Cir. 1972) (App. 49a). The evidence on that relationship was no different at the second trial than the first.[7]

---

[7]Furthermore, the jury instruction on the proof needed to establish reckless disregard for the truth concerned the knowledge of the publisher, not the writer. Likewise, the jury was instructed on liability for republication of a libel, which was unnecessary if Mr. Stang was the petitioner's agent.

The concept of freelance writers and photographers is familiar to this Court and other courts. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 563 (1977); *Time, Inc. v. Hill*, 385 U.S. 374, 392 (1967); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1124 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Freelancers accept assignments from, or submit material to, a variety of publications. They may be associated more with one publication than others, having had their work appear more frequently therein, but they remain free to contract with those whom they wish.

Several courts have held that a freelance writer's actions which may constitute actual malice are not attributable to the publisher under any agency theory. Only the publisher's own overt behavior or knowledge of an employee's behavior can support a finding of actual malice on his part. *Miss America Pageant, Inc. v. Penthouse International, Ltd.* 524 F. Supp. 1280, 1284, 1286-88 (D.N.J. 1981) (freelance writer's knowledge not attributable to magazine publisher); *Bindrim v. Mitchell*, 91 Cal. App. 3d 61, 74-75, 155 Cal. Rptr. 29, 36 (1979) (freelance author's knowledge not attributed to book publisher). *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 n. 6 (1974). The reason is explained in *Catalano v. Pechous*, 83 Ill. 2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350, 361 (1980), *cert. denied*, 451 U.S. 911 (1981), which states that a "republisher of a defamatory statement . . . cannot be held liable [when actual malice is required] unless he himself knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity. It is not sufficent that the originator of the statement made it with actual malice."[8]

[8]Although a republisher of a libel can be held liable for compensatory damages on a negligence theory, the Court of Appeals imputed alleged actual malice on the part of Mr. Stang to the petitioner. Furthermore, petitioner does not concede that Mr. Stang acted with actual malice, and the recitation by the Court of Appeals, 680 F.2d at 539 n. 19 (App. 25a), reflects at best *negligence* on Mr. Stang's part, rather than knowing falsity or reckless disregard of the truth.

It would destroy the "clear and convincing proof" requirement, *Gertz I, supra,* 418 U.S. at 342, to attribute actions of freelance writers to publishers through an agency theory in order to find that publishers acted with actual malice. Were this permitted, a publisher who has confidence in a freelance writer, who has no reason to doubt the truthfulness of an article and who may even have investigated further himself could be found to have acted with actual malice even though the freelance writer was not an agent or employee of the publisher.[9]

Moreover, the relationship between magazines and freelance writers also comports with the general definition of independent contractor. That is, an independent contractor is one who contracts to do certain work according to his own methods subject to the control of his employer only as regards the product or result of his work. *Casement v. Brown,* 148 U.S. 615, 622 (1893). Similarly, a freelance writer is one who writes "either on speculation or on orders from the editors. These writers are paid fees for their work and do not function as members of the staff." W. Agee, P. Ault & E. Emery, *Introduction to Mass Communications* 246 (6th ed. 1979).

Mr. Stang, then, was a freelance writer, not an agent of the petitioner. In that capacity, his actions could not be attributed to the publisher in order to hold that the publisher acted with actual malice. Because the Court of Appeals did so, it has both ignored the prior teachings of this Court and has presented an important, recurring question of constitutional libel law which this Court should review.

---

[9]The cases relied on by the Court of Appeals to support its contention that an agency relationship existed between Mr. Stang and Robert Welch, Inc., are inapposite since none of them hold or infer that a freelance writer is an agent of the publisher. They do no more than repeat general agency law. *Gertz v. Robert Welch, Inc., supra,* 680 F.2d at 539 n. 19 (App. 25a).

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT IN HOLDING THAT A STATEMENT THAT A PERSON IS A "MARXIST," "LENINIST" OR "COMMUNIST-FRONTER," BASED ON PRESENTED FACTS, IS A STATEMENT OF FACT AND THUS NOT PROTECTED AS OPINION UNDER THE FIRST AMENDMENT

The Court of Appeals ruling conflicts with this Court's holding in this very case and with other courts which have followed that decision. This Court held as follows:

> We begin with the common ground. *Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.* But there is no constitutional value in false statements of fact.

418 U.S. at 339-40 (footnote omitted) (emphasis added).

That is, as one court has said, "An assertion that cannot be proved false cannot be held libelous." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). Since opinions are not statements of fact and, therefore, cannot be proved false, they cannot be defamatory. *See Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), holding that "what constitutes an 'openly fascist' journal is as much a matter of opinion or idea as is the question what constitutes 'fascism' or the 'radical right' . . . ." *Id.* at 895. Many state and federal courts have followed this approach. *See, e.g., Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (statement of opinion is not defamatory); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 552 P.2d 425 (1976) (statements of opinion cannot constitute actionable defamation); *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979) (adopting *Gertz I* approach and *Restatement (Second) of Torts* § 566); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1325 (1982) ("expressions

of 'pure' opinions . . . are guaranteed virtually complete constitutional protection"); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977) (expressions of opinion are protected by First Amendment); *Myers v. Boston Magazine, Inc.*, 1980 Mass. Adv. Sh. 907, 403 N.E.2d 376 (1980) (statements of critical opinion not actionable defamation); *Pease v. Telegraph Publishing Co., Inc.*, 121 N.H. 62, 426 A.2d 463 (1981) (opinion is protected under First Amendment); *Kotlikoff v. Community News*, 89 N.J. 62, 444 A.2d 1086 (1982) (adopting *Gertz I*, and *Restatement (Second) of Torts* § 566); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977) (statement of opinion not actionable defamation); *Ollman v. Evans*, 479 F. Supp. 292, 293 (D.D.C. 1979) (opinion not actionable, adopting *Gertz I*).

In reaching this conclusion, the Court of Appeals incorrectly stated that Gertz was described as "a Communist or part of a Communist conspiracy," *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 531 (7th Cir. 1982) (App. 6a). This Court previously and correctly observed that the petitioenr's article said no more than that Mr. Gertz "had been an official of the 'Marxist League for Industrial Democracy . . .' [and] labeled Gertz a 'Leninist' and a 'Communist-fronter.'" *Gertz I, supra*, 418 U.S. at 327. The article did *not* say that Mr. Gertz was a member of the Communist Party or that he was a Communist.

Labeling a person a "Marxist," "Leninist" or "Communist-fronter" is not a specific allegation of fact, such as membership in an organization, especially when the article listed the memberships upon which these characterizations are based. Those terms are no more a statement of fact than labeling someone a "left-winger," a "radical," a "reactionary," a "fascist" or a "racist." Each of these terms is susceptible to a wide variety of meanings, in large part determined by the speaker's own political ideology.

It is particularly important to hold political hyperbole as opinion, and thus protected, since, as this Court has emphasized, there is "a profound national commitment to the principle

that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co. v. Sullivan, supra,* 376 U.S. at 270. Thus this Court and other courts have protected exaggerated and even outrageous political speech on this basis. *See, e.g., Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6 (1970) ("blackmail" used to characterize negotiating position of real estate developer). Because the Court of Appeals decision conflicts with these rulings, it should be reviewed by this Court.

IV. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRENT QUESTION OF FEDERAL CONSTITUTIONAL LAW REGARDING WHETHER A DEFAMATION ACTION SHOULD BE PERMITTED IN THE ABSENCE OF PROOF OF INJURY TO REPUTATION

An independent reason for this Court to grant its writ of certiorari is that the damage award in this defamation action was not based on any proven injury to reputation.

In attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment, *see Gertz I, supra,* 418 U.S. at 349, this Court held that without proof of actual malice defamation plaintiffs are limited to compensation for actual injury. *Id.* While not defining the term, this Court said that such damages are "not limited to out-of-pocket loss . . . [but] include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350. State courts were allowed to define the term further, *id.,* but were admonished to be certain that plaintiffs not secure "gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349. *See Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 861, 330 N.E.2d 161, 170 (1975) ("[J]udges have a special duty of vigilance in . . . see[ing] that damages are no more than compensatory.")

Mr. Gertz presented no proof that he suffered actual damages as a result of the alleged libel beyond an allegation that his feelings were hurt. Particularly, he did not prove injury to reputation. Rather, the testimony was that his reputation was impeccable both both before and after publication of the article, and there was no evidence of loss of income resulting from the article. Nevertheless, the jury awarded Mr. Gertz $100,000 in actual and $300,000 in punitive damages, the second largest defamation award against a media defendant upheld by an appellate court since *New York Times Co. v. Sullivan, supra,* 376 U.S. 254.[10]

It is critical in fostering robust debate and avoiding self-censorship that juries not be allowed to award what are in essence punitive damages in the guise of compensatory damages without proof of injury to reputation. *See Gertz I, supra,* 418 U.S. at 349 (deploring allowing "juries to punish unpopular opinion" through recovery of "gratuitous" damages of $50,000 without evidence of actual loss).[11]

Certainly, self censorship would result if the compensatory damage award in this case is allowed to stand. Damage awards,

---

[10] *See* Franklin, *Suing the Media for Libel: A Litigation Study,* 1981 ABF Research J. 795; Libel Defense Resource Center Bulletin, Aug. 15, 1982, at 2-17.

The largest damage award upheld since 1964 was in *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) ($460,000 combined damages).

[11] "It's not that I necessarily want to give $400,000 to Elmer Gertz," the 25-year-old foreman [of the jury at the second trial] said outside the courtroom after the verdict was returned. "I was looking at it like I really wanted to punish the John Birch Society, the only quetion was the amount of the damages. I personally would have liked it higher because I wanted to stick it to the John Birch Society." *See* "Gertz Verdict: Leninist Label Was Malicious Libel," attached as an exhibit to Defendant's Amended Post Trial Motion, filed May 21, 1981. *See* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1438-39 (1975).

at least when the mass media are defendants, based not on injury to reputation or concomitant loss of income but on asserted personal humiliation contravene such precepts.[12]

This particularly is true when it is realized that, as this Court has said, "damage to reputation is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). *See* W. Prosser, *Law of Torts* 737 (4th ed. 1971) (defamation law protects "an invasion of the interest in reputation and good name"). Defamation law is intended to protect the good opinion others in the community have of one allegedly defamed. Indeed, derogatory words said to an individual but not to others may cause personal anguish, but are not defamatory because they did not cause a diminution in the individual's reputation. As Professor Prosser emphasizes, "Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action." *Id. See id.* at 739, 761; *Gobin v. Globe Publishing Co.*, 8 Med. L. Rptr. 2191, 2194 (Kan. 1982).

Several state courts have agreed. The Kansas Supreme Court held that "[u]nless injury to reputation is shown, plaintiff has not established a valid claim for defamation . . . . It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander." *Gobin v. Globe Publishing, supra*, 8 Med. L. Rptr. at 2194. *See France v. St. Clare's Hospital & Health Center*, 82 App. Div. 2d 1, 441 N.Y.S.2d 79 (1981); *Salamone v. MacMillan Publishing Co., Inc.*, 77 App. Div. 2d 501, 429 N.Y.S.2d 441 (1980). This position has been stated forcefully by Justice Brennan. *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n. 3 (1976) (Brennan, J., dissenting).

---

[12]Although this Court in *Gertz I, supra*, 418 U.S. at 350, included "personal humiliation" and "mental anguish" as elements of compensatory damages, petitioner submits that this Court did not intend to allow such elements without adequate proof of damage to reputation.

To the extent that *Time, Inc. v. Firestone, supra,* holds otherwise in rejecting an argument that "the only compensable injury in a defamation action is that which may be done to one's reputation" in allowing Florida "to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation," *id.* at 460, it either should be properly limited or reevaluated in light of the historical purpose of defamation laws and the necessary protection this Court has given the media in discussing public issues.

The Court of Appeals decision squarely presents the issue of whether damages for libel can be awarded consistent with First Amendment principles absent proof of damage to reputation. That is an important question for this Court to resolve.

V. THE DECISION BELOW CONFLICTS WITH THIS COURT'S EARLIER OPINION BECAUSE UNDER THE DOCTRINE OF LAW OF THE CASE, ACTUAL MALICE SHOULD NOT HAVE BEEN RELITIGATED AFTER BEING FULLY LITIGATED PREVIOUSLY AND FOUND NOT TO EXIST

This Court has stated that "when an issue is once litigated and decided that should be the end of the matter." *United States v. United States Smelting Refining & Mining Co.,* 339 U.S. 186, 198 (1950). While the Court of Appeals agreed, it incorrectly held that the trial court could relitigate the issue of actual malice on the basis that the issue had not been decided by this Court. *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 532-33 (7th Cir. 1982) (App. 10a-11a).

Indeed, not only did this Court necessarily decide the issue, but two other courts did so as well, all agreeing that actual malice was not proved against the petitioner in the first trial.

At the trial on remand in this case, the district court held, based on Illinois law decided after *Gertz I,* that Mr. Gertz would be required to prove actual malice to recover even compensatory damages. *See Gertz v. Robert Welch, Inc.,* 680 F.2d 527,

532 (7th Cir. 1982) (App. 8a).[13] At that time, the District Court, once finding that Mr. Gertz was required to prove actual malice, was required to follow the law of the case and not allow the case to be submitted to the jury, since this Court, the first District Court, and the Court of Appeals all had held that Robert Welch, Inc., did not publish with actual malice. Specifically:

(1) The first District Court withdrew all issues from the jury except the proper measure of damages. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

With respect to the lack of actual malice the District Court held in the first trial:

> Stanley clearly did not act with actual malice or with reckless disregard for the truth . . . .
>
> Plaintiff having failed to establish actual malice on the part of defendant . . . .
>
> * * *
>
> Having already concluded that there was not sufficient evidence presented at trial to support a finding of actual malice or reckless disregard for the truth, judgment notwithstanding the verdict should be entered for the defendant.

322 F. Supp. at 999, 1000 (citation omitted).

In addition to concluding that the respondent had not presented sufficient evidence at trial to support a finding of actual malice, the District Court held that "no jury could

---

[13]The trial court required proof of actual malice for compensatory damages because of its reliance on conditional privilege under Illinois law. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 534 (7th Cir. 1982) (App. 14a). Of course, once the trial court decided punitive damages could be awarded despite this Court's earlier decision, proof of actual malice was necessary.

reasonably find that the defendant acted with actual malice." 322 F. Supp. at 1000.[14]

(2) The first Court of Appeals decision held that there was no evidence that the petitioner had published Mr. Stang's article with actual malice:

> There is no evidence that Stanley actually knew that Stang's article was false; defendant did not "deliberately publish falsehoods." The question is whether the publication was made recklessly.
>
> * * *
>
> Second, the Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved. Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. Apart from the failure to verify Stang's facts, and an apparent disposition to assume that a lawyer who could file a civil rights case against a policeman may well be a "Communist fronter," *there is no evidence that Stanley acted recklessly within the Supreme Court's definition of that term.*
>
> To assume that Stanley must have known, on the basis of information received from Stang over the telephone or from some other source, that the comments about plaintiff were false, would itself be reckless. Our examination of the record satisfies us that "'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands.'"

---

[14]At the first trial the District Court also stated several times during the argument on motion for directed verdict that actual malice had not been shown. Tr. 55-56, 58-59, Sept. 22, 1970.

471 F.2d at 806-07 (footnote omitted) (emphasis added) (App. 46a-48a).

(3) Implicit in this Court's decision in *Gertz I* is that Mr. Gertz failed to prove that the defendant acted with actual malice. This finding is clear from both the majority and a dissenting opinion:

> After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "'high degree of awareness of . . . probable falsity.'" . . . *The evidence in this case did not reveal that respondent had cause for such an awareness.*

Gertz I, 418 U.S. at 330-32 (citations omitted) (emphasis added).

> It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.

Gertz I, 418 U.S. at 349.

> Petitioner [Gertz] asserts that the entry of judgment *n.o.v.* on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record.
>
> * * *

> Thus, petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so.

Gertz I, 418 U.S. at 329-30 n. 2.

Justice Brennan in his dissenting opinion also recognized that the majority had found that Gertz had had the opportunity to prove actual malice but had failed to do so:

> Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante*, at 329-30, n. 2, I would affirm the judgment of the Court of Appeals.

Gertz I, 418 U.S. at 369.

The issue of "actual malice" was fully litigated in the first trial and the trial court, the Court of Appeals and this Court each held that Mr. Gertz had failed to prove actual malice. Moreover, he lost in both the Court of Appeals and this Court on his alternate theory that he had been deprived of the opportunity to prove actual malice.

The Court of Appeals erred when it stated that "[w]hether or not actual malice had been proved below simply was not an issue before the [Supreme] Court." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982) (App. 12a). It was equally in error when it stated that this Court only "suggests" in several places that actual malice was not proven at the first trial. *Id.* at 532 n. 5 (App. 10a). This Court not only found that actual malice had not been proven at the first trial, but that finding was critical to its disposition of the case.

The key to demonstrating the Court of Appeals' disregard of this Court's mandate is analyzing why this Court remanded the case for retrial rather than reinstating the initial jury's $50,000 verdict. The first District Court entered judgment n.o.v. for the petitioner and the Court of Appeals affirmed, holding that Mr.

Gertz was required to prove actual malice to recover even compensatory damages. Thus when this Court reversed in *Gertz I, supra,* 418 U.S. 323 on the ground that Mr. Gertz was *not* a public figure and therefore did not have to prove actual malice, it remanded the case for a new trial only because the $50,000 verdict was not supported by any evidence of negligence or actual injury. Thus, in addition to the public figure issue, this Court's ruling was peculiarly concerned with the proper standard for an award of compensatory damages. This Court held that because Mr. Gertz had been required to show a higher standard (actual malice) than negligence he should be allowed a retrial at which point he could attempt to obtain compensatory damages under a lesser standard, provided that there was sufficient evidence of actual injury. The remand required only that the plaintiff be given the opportunity to prove negligence and actual injury, and the issue of actual malice was no longer in the case for purposes of the trial. Moreover, as noted above, this court found that Mr. Gertz had tried and failed to prove actual malice at the first trial.

The only reasonable conclusion is that the remand was for the trial of the issue of compensatory damages, the issue of actual malice having been settled. Because the Court of Appeals disregarded this Court's mandate, its decision should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID MACHANIC
J. LAURENT SCHARFF
*GEORGE R. CLARK
ROBERT TRAGER
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

GARY HANDY
395 Concord Avenue
Belmont, Mass. 02178
(617) 489-0606

Counsel for Petitioner
**Counsel of Record*

December 14, 1982